

**FITCH & ASSOCIATES, LLC**Received 11/1/06  
MSHA/OSRV

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Mine Safety and Health Administration  
Office of Standards, Variance, and Regulations  
1100 Wilson Boulevard, Suite 2350  
Arlington, Virginia 22209-3939

Re: Proposed Rule on Civil Penalties  
RIN 1219-AB51

Dear Sir or Madam:

With the exception of comments by those who are not subject to receiving civil penalties under the Mine Act, the vast majority of the comments received express significant disagreement with the agency on its presumptions related to the elimination of the single penalty and the general increase in civil penalties beyond those mandated by the Miner Act.

Since nearly 75% of the citations issued in 2005 received the single penalty, it should be fixed and not eliminated.

Fixing the single penalty requires two issues to be focused on by the committee;

First, the penalty should be revised so that it is appropriate based on the size of the mine operator, as I suggested in my testimony at pages 18-22 of the first hearing transcript. A new lower penalty for small operators of \$50.00 should be established. This would properly address some of the comments of the small operators. Higher minimum penalties should be established for medium and large size operators.

AB51-COMM-85

Second, are MSHA inspectors using the non-S&S finding properly? A review of the single penalty citations will either support the finding that 75% of the citations issued were properly designated as non-S&S by the inspectors, or it will result in examples that can be used to train inspectors in making an S&S determination properly. If a citation is properly a non-S&S violation it should receive a minimum penalty based on the size of the operator.

A review of the comments also establishes that under the proposal, significant penalty increases will occur without a related enhancement in safety being achieved. The Colorado Mining Association, Peabody Energy, NMA, and others provided significant examples of unfair penalty enhancements for operators despite the recognized effectiveness of their safety programs.

Finally the proposal to reduce the 30% good faith abatement credit is unsupported by the beliefs advanced in support of the change. If any change is necessary a 20% credit should be considered since there are generally 5 criteria that are considered in setting an appropriate penalty. The sixth criteria: the ability to remain in business, is an affirmative defense, based on an individual operator's unique finances. Penalties should, in theory, weigh each of the five criteria for each S&S violation for each operator. The failure of an operator to abate a violation on time penalty factor should be maintained since those operators are, at least on those violations, the bad apples that need increased penalties to encourage enhanced compliance.

Sincerely,



Edward H. Fitch, IV  
Fitch & Associates, LLC